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TWO FOOTNOTES TO GARVEY AND CONEY: A DILEMMA ABOUT MATERIAL COOPERATION, AND A CONCERN ABOUT THE NOMINATION PROCESS

MARK V. TUSHNET*

I can only offer two footnotes to John Garvey and Amy Coney's splendid discussion of the obligation, if any, of Catholic judges to recuse themselves in death penalty cases.¹ Much of their article describes the Catholic position on the death penalty, the nature and scope of an orthodox Catholic's obligation to act in compliance with that position, and the distinction drawn in Catholic moral teaching between formal and material cooperation with evil. I am an outsider to the tradition in which these discussions have taken place, but my first footnote is that, as I understand that tradition, Garvey and Coney appear to have omitted discussion of a consideration that seems relevant to the analysis of whether an orthodox Catholic judge materially cooperates in the administration of the death penalty. That consideration is the dilemma that the very possibility of recusal poses.

The dilemma may arise in several settings, but here I deal with it in its simplest forms. Consider first the judge (I omit in what follows the obvious modifier, "orthodox Catholic") who would preside over the guilt phase in a case in which the prosecutor has filed a notice of intention to seek the death penalty. Garvey and Coney argue that this judge need not recuse himself or herself because merely presiding at the guilt phase is material cooperation that, on balance, is insufficient to support the conclusion that the judge has acted immorally. Suppose, however, that the judge believes that death penalty cases are characterized by a higher rate of trial error in the guilt phase than non-capital cases. Suppose that this belief is based on the notion that the pressures on prosecutors to obtain convictions that will support death sentences induce

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1. John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303 (1998).

overreaching and the notion that the pressures on defense attorneys induce a kind of fatalistic paralysis that leads them to sloppy behavior.² Further, suppose the judge believes that appellate courts scrutinize claimed errors in the guilt phase of capital cases more closely, on the ground, perhaps unconsciously held, that "death is different."³ The trial judge is of course conscientious, and will conduct any trial in a way that makes it as error-free as possible. If the judge's scrupulous actions during the trial's guilt phase produce a record free of error and the jury convicts, the judge will have increased the probability that a death sentence, if imposed at the penalty phase, will be carried out.⁴ As I understand Garvey and Coney's description of Catholic moral teaching, actions that increase the probability of evil actually occurring constitute material cooperation with evil. The judge who presides over the guilt phase of a capital trial therefore provides material cooperation through his or her efforts to make the trial as error-free as possible.

Recusal, however, does not eliminate the problem of material cooperation, although it may attenuate it.⁵ Suppose the judge believes that the "substitute" judge—the one who will be called on to preside if the judge recuses himself or herself—is likely to allow more errors during the trial.⁶ In itself, this would *decrease* the probability that a death sentence, if imposed, would be carried out. Unfortunately, a simple increase in trial errors may have two offsetting effects: The errors may

2. Indeed, the judge might believe that this ineradicable error rate is an important feature of death penalty cases supporting the conclusion that the death penalty is unconstitutional as well as immoral.

3. To me that conclusion seems well-supported by the Supreme Court's decisions about criminal procedure—trial error—during the 1950s and 1960s.

4. I simply note the possibility that a prosecutor, concerned that this judge will be over-scrupulous because of the judge's agreement with Catholic doctrine, might seek to remove the judge. Garvey and Coney do not analyze whether a judge-specific motion to recuse should be granted, devoting their attention instead to the question of whether the judge's religion alone supports such a motion.

5. As I understand the relevant moral teaching, the attenuation occurs because the judge's actions in recusing are even more remote from the evil than participating in the trial's guilt phase. See James F. Keenan, S.J., *Cooperation, Principle of*, in *NEW DICTIONARY OF CATHOLIC SOCIAL THOUGHT* 232, 234 (Judith A. Dwyer ed., 1994).

6. If the substitute judge is likely to make fewer errors, recusal increases the probability that a death sentence, if imposed, will be carried out, over such probability if the judge himself or herself presides. To me, the analysis seems to me the same, although the degree of material cooperation is of course smaller. (I should note that my unfamiliarity with Catholic moral teaching makes me uncomfortable in suggesting that material cooperation comes in sizes like "large" and "small.") To the extent that Catholic moral teaching requires some sort of on-balance judgment, however, some metaphor implicating size or weight seems inevitable. According to Keenan, *supra* note 4, at some points in the moral analysis, "a considerable *weighing* of values occurs" (emphasis added).

increase the probability of reversal if a conviction is obtained, but they may also increase the probability that a conviction will be obtained. If the probability of conviction increases enough relative to the increase in the probability of reversal, the judge who recuses may make it *more* likely that the death penalty will be carried out. Both recusing and presiding, then, appear to constitute material cooperation with evil.⁷

Similarly, if, as Garvey and Coney argue, sitting as an appellate judge constitutes material, but not formal, cooperation with evil, recusing oneself from an appellate panel may do so as well, by increasing the probability that a death sentence will be affirmed. This is so because, as they hint in their brief comment that judges can “find reasons to reverse even in easy cases,”⁸ all judges have some interpretive or discretionary space when dealing with claims of procedural unconstitutionality in connection with a death penalty trial or capital sentencing hearing, regardless of the constitutional status of the death penalty.⁹ A conscientious judge might think that he or she will be more alert than any substitute judge to these problems precisely because of the judge’s views on the death penalty.¹⁰ Recusing will once again make it more likely that the conviction and death sentence will be affirmed.¹¹

My second footnote expands on Garvey and Coney’s discussion of whether a motion to recuse a judge based solely on the fact that the judge is Catholic should be granted. I have no quarrel with their conclusion that it should not. Garvey and Coney say that the inference from religious affiliation to actual belief is far too weak to make membership alone something that a reasonable person would think gave rise

7. Although of course a lot will depend on circumstances.

8. Garvey & Coney, *supra* note 1, at 342.

9. Garvey and Coney overstate the suggestion when they characterize a judge who searches deeply for reversible error as a judge engaging in “cheating.” *Id.* at 343. A better word, which they use as well, is “nit-picking.” *Id.* at 343. But, after all, nit-picking is ineffective unless there are nits to pick. Given interpretive flexibility, an ever-present characteristic of any complex legal system is that judges ordinarily can *fairly* find reversible error, particularly if they think it is proper to invoke a “death is different” standard.

10. In this setting, Garvey and Coney’s analysis produces an odd structure of hope for litigants: Defendants would like judges who are persuaded by Garvey and Coney’s analysis to refrain from acting on it, so that they would have a sympathetic judge hear their case and thereby increase their probability of avoiding the death penalty. Prosecutors would like such judges to recuse themselves, thereby increasing the probability that a death sentence will be carried out, producing a result contrary to the moral teachings that motivate the judge’s decision to recuse.

11. I genuinely wonder about the possibility that a judge can insulate himself or herself from moral criticism even further by participating in the decision up to the point when the judge’s colleagues outvote him or her.

to an appearance of partiality. But suppose we switch from a setting in which all we know about a judge is his or her religious affiliation. Instead of thinking of a judge faced with a motion to recuse, consider a nominee for a judicial position. Assume that Garvey and Coney's analysis becomes widely known, and a substantial number of Catholics begin to think that their co-religionists who are judges should ordinarily refuse to preside over the penalty phase in capital cases. A Catholic is nominated for a position as a federal district judge. May a senator properly ask the nominee, "Do you agree with Garvey and Coney's position about your religious obligations, and if so, do you intend to recuse yourself from presiding over the penalty phase in capital cases?"

There is a view of the proper scope of senatorial inquiry that would rule such a question out on the ground that senators should examine only the nominee's general legal ability and character, not his or her specific views on any particular matter.¹² I believe, to the contrary, that a senator can properly ask a wide range of questions seeking information that will support a predictive judgment about the nominee's likely behavior, including how the nominee will rule on controversial issues. Suppose a broad inquiry, though perhaps not as broad as that, is proper. Is the inquiry into the nominee's position on recusal in light of Garvey and Coney's argument and the nominee's religion nonetheless improper?

I doubt that either of the arguments Garvey and Coney make against a determination that a Catholic judge may not preside in a death penalty case without giving the appearance of partiality bars the inquiry. The senator is not seeking to draw an inference from the nominee's religious beliefs alone; the senator is not asserting that something follows "simply by virtue of [the nominee's] membership in the Catholic Church."¹³ Rather, the senator is asking about the behavioral implications of holding a belief—a belief that the senator does not know the nominee holds until the question is answered.¹⁴

But what is the behavior in which the senator is interested? It is not that the nominee might subordinate his or her legal judgment to his or her religious beliefs, because the behavior at issue, recusal, is authorized by law. The senator, then, seems to be asking whether the nominee will

12. See, e.g., Bruce E. Fein, *A Circumscribed Senate Confirmation Role*, 102 HARV. L. REV. 672 (1989).

13. Garvey & Coney, *supra* note 1, at 347.

14. For the same reason, it does not seem to me that the senator is moving in the direction of imposing a religious test.

pursue a lawful course of conduct once in office.¹⁵ And, even for one who holds the view that senators may ask a lot of questions, it is not clear to me exactly why finding out that a nominee will recuse himself or herself is at all relevant to the confirmation issue.¹⁶

I conclude with a point that should be obvious. Nowhere in the course of their paper do Garvey and Coney identify a single judge who has recused himself or herself from the capital punishment process because of the judge's adherence to Catholic doctrine. Perhaps judges disagree with their analysis of the orthodox Catholic judge's obligation.¹⁷ I think it more likely, however, that judges simply have not given the topic much thought. If some judges come to have second thoughts about their participation in death penalty cases, Garvey and Coney will have performed an invaluable service.

15. One might analogize this situation to the law of accommodation of religious beliefs under federal employment discrimination law: it is difficult to see why anyone needs to know whether a religious believer will seek an accommodation authorized by law, and it is easy to see why we might be nervous about allowing pre-employment inquiries about the applicant's intentions.

16. Were such a question to be asked, it might be based on the senator's view that someone who agrees with Garvey's and Coney's analysis of the recusal question might rule in a particular way on the merits of issues presented in other cases. Such a senator would then be inferring a position on substantive questions from religious belief and would be subject to Garvey and Coney's two-fold criticism.

17. It seems to me that judges should not rely on reasons akin to those offered by Governor Cuomo for his position on abortion. Governor Cuomo argued that, to promote social harmony and leave open the possibility that moral teachings now associated specifically with the Catholic Church would become much more widely held in the long run, Catholic public officials should not use their offices to advance those of the Church's moral teachings that are now highly contentious in the society. Mario M. Cuomo, *Religious Belief and Public Morality: A Catholic Governor's Perspective*, 1 NOTRE DAME J.L. ETHICS & PUB. POL'Y 13 (1984). But a judge who recuses himself or herself does not seem to be "using" the office of judge to advance a contentious moral position.

